NO. 75-1526

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

BIEDENHARN REALTY COMPANY, INC.,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Biedenharn Realty Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 26, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, en banc, reported at 526 F.2d 409 (5th Circuit 1976) appears in Appendix I

hereto. The opinion of the Court of Appeals for the Fifth Circuit, Gewin, Ainsworth and Gee, reported at 509 F.2d 171 (5th Circuit 1975) is included in Appendix II. The opinion of the District Court for the Western District of Louisiana, reported at 356 F.Supp. 1331, is included in Appendix III.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 26, 1976, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether real property purchased and held as an investment loses its status as a capital asset if the owner improves, subdivides and sells it in order to realize its appreciation in value.

STATUTORY PROVISIONS INVOLVED

Internal Revenue Code of 1954, as amended, United States Code, Title 26:

"§1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; " * * *

STATEMENT OF THE CASE

This is a tax refund suit involving the definition of "capital asset" found in Section 1221 of the Internal Revenue Code of 1954, as amended. Petitioner filed the instant civil action on the ground that its income taxes had been overpaid for 1964, 1965 and 1966 because it had sold property which constituted capital assets in its hands but had partially returned the gains from the sale of the property as ordinary income.

Petitioner is a corporation organized in 1923 by Joseph Biedenharn as a vehicle for holding and managing the Biedenharn family's investments. The company owns commercial properties, a substantial stock portfolio, a motel, warehouses, a shopping center, residential real property and farm property.

In 1935, for $50,000, the petitioner purchased Hardtimes Plantation, a 973-acre farm north of the City of Monroe, Louisiana. Hardtimes was purchased as an investment and was utilized in a farming operation. The growth of

the City of Monroe, however, created a demand for residential building lots and between 1939 and 1966 the petitioner created three subdivisions comprised of approximately 185 acres from which it or real estate brokers sold 208 lots in 158 sales. Petitioner also sold 275 acres of non-subdivided land from Hardtimes in 12 sales between 1939 and 1966. Petitioner continues to utilize the remainder of Hardtimes as a farm.

Petitioner improved its subdivided property by adding streets, drainage, water, sewerage and electricity. The total profit on all of the sales of lots from Hardtimes from 1939 through 1966 was in excess of $800,000, most of which was attributable to the initial bargain price of Hardtimes and the growth of the City of Monroe.

This litigation is concerned solely with the question of whether the properties sold by petitioner in 1964, 1965 and 1966 were capital assets as defined in Section 1221 or were "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" as that phrase is used in Section 1221(1) and thus within the exception to the capital asset definition.

The District Court resolved this issue in favor of petitioner, holding that Hardtimes had been acquired as an investment; that petitioner's improvement and sale of the property did not cause it to be in the trade or business of selling real estate and, consequently, it was entitled

to capital gain treatment on the sale of its property.

On appeal, the Fifth Circuit affirmed the decision of the District Court. In so doing, it rejected the argument that improvement, subdivision, and sale caused property acquired and held for investment to become property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Upon rehearing, the Fifth Circuit, en banc, reversed the opinion of the District Court. In its decision it interpreted Section 1221(1) to cause real estate to fail the capital asset test when the owner improves, subdivides and sells unless the decision to sell results from unanticipated, externally induced factors which make impossible the continued pre-existing use of the realty.

REASON FOR GRANTING THE WRIT

The Decision of the Fifth Circuit Raises Important and Recurring Problems in Judicial and Administrative Application of the Income Tax Law.

The most litigated question in the entire tax field is whether real estate which was sold by a vendor was held by him as a "capital asset" or was "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;" yet the Courts of Appeal have never been able to come to grips with this question in such a way as to set down understandable criteria by which an owner of real

estate can determine if the gain from the sale of his property will be ordinary income or capital gain. Neither can owners of real estate or their advisers distill from the case by case approach of the lower courts the steps they must take or avoid to be entitled to capital gains on the sales of their property. Indeed, the opinion of the original panel in the instant case indicates its agreement with the Merten's quote: "If a client asks in any but an extreme case, whether in your opinion, his sale will result in capital gain, your answer should probably be, 'I don't know and no one else in town can tell you.'"

The reasons for this confusion are several. First, the lower courts have interpreted the phrase "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" as if it contained a separate and additional exception to the capital asset definition in spite of the legislative history which makes it clear that the phrase was added simply to make certain that real estate would be treated as inventory even though the accountants would not so classify it.[1] Secondly, by concentrating on the exceptions contained in Section 1221(1), to the exclusion of the general rule of Section

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[1] Ways and Means Committee Report (68th Cong., 1st Sess., H. Rept. 179 (p. 19). Senate Finance Committee Report (68th Cong., 1st Sess., S. Rept. 398 (p. 22)).

1221, the lower courts have lost sight of the fact that the purpose of the definitions in Section 1221 is to differentiate between the profits and losses arising from the everyday operation of a business on one hand and the realization of appreciation in value accrued over a substantial period of time on the other. Finally, the courts' ad-hoc approach to the question, coupled with the view of the Fifth Circuit that a lower court's finding that property is not held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business is not subject to the clearly erroneous rule of Rule 52(a) of the Federal Rules of Civil Procedure, has resulted in a proliferation of seemingly irreconcilable decisions. The result is that there is no discernable law in this area.

Capital gains result from sales or exchanges of capital assets. Capital assets include, among other things, property held for investment[2] but

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[2] Section 206(a)(6) of the Revenue Act of 1921 defined capital assets as * * *" property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock or shares in a corporation, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year." In 1924, Congress eliminated the phrases "held for profit

do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Section 1221(1). If property held for investment is a capital asset and a capital asset can be sold for a capital gain, then it must follow that property held for investment can be sold and a capital gain realized. The Fifth Circuit has not held in the instant case that investment property cannot be sold for capital gains but it has effectively denied capital gain treatment on the sale of property held for investment to a large class of real estate investors by its interpretation of Section 1221(1).

The Fifth Circuit has decided in the instant case that capital gain treatment for property which is improved, subdivided and sold does not depend upon whether the property was held as an investment but upon whether the decision to sell was the result of being forced to abandon prior

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or investment" and, "but does not include property held for the personal use or consumption of the taxpayer or his family," in order that the gain from the sale of a dwelling house would qualify for capital gain treatment. Senate Finance Committee Report (68th Cong., 1st Sess., S. Rept. 398).

uses of the property or was a purely voluntary response to increased economic opportunities. In other words, if an investor in unimproved land decides to realize on his investment by subdividing and selling his property he forfeits capital gain treatment if his decision to sell was brought about by his desire to realize the increased value of his investment; but maybe not, if the property is no longer useful for the purpose it was purchased.

Such a dichotomy has no support in the tax law or in common sense or the rationale of Malat v. Riddell, 383 U.S. 569 (1966). If property is investment property it is investment property and its sale should result in capital gain whether or not the investor sold the property in order to make the gain or because the property was no longer useful for the purposes for which it had been previously used. Buying and holding property for price appreciation is just as much an investment activity as is buying property to rent or to otherwise derive current revenues. The sale of unimproved real estate bought for appreciation is just as much the sale of investment property as is the sale of a rent house. To make capital gain on the sale of real estate turn on the reason the owner decided to sell robs the capital gains provisions of all meaning.

The result of the Fifth Circuit's decision is to make an owner of land, whose ordinary course of business is not selling real estate, subject to ordinary income treatment on the sales of land which has appreciated in value over a substantial

period of time if he takes steps to make the property suitable for sale for its highest and best use and his purpose in selling was to reap that gain. The farmer whose land appreciates in value because of the approach of the City loses his capital gain if he makes an additional investment to make his land suitable for the use for which it is the most valuable; however, the owner who invested in a tract of land on which to build apartment houses may improve, subdivide and sell at capital gains rates if his property is zoned single family residential.

What the Fifth Circuit has done in the instant case is to fall into the semantical snare of Section 1221(1) and look, not at the meaning of the phrase "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," but at the meaning of each word in the phrase. The phrase, "property held by the taxpayer primarily for sale in the ordinary course of his trade or business" was added as an exception to the capital asset definition in 1924 because the contention had been made and ultimately sustained in the Board of Tax Appeals that real estate was not property of a kind which would properly be included in inventory of the taxpayer if on hand at the close of the taxable year. Gilbert S. Wright, 22 B.T.A. 1045 (1931). The legislative history makes it clear that the phrase means nothing more than inventory or stock in trade. [3] It was not intended to create an additional or independent test.

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[3] Footnote 1, supra.

The Fifth Circuit in the instant case, has concentrated on the words "property held for sale," in the phrase, as if those words provided a threshold test for ordinary income treatment. Such an approach puts the status of an investor in real estate in jeopardy at the moment he decides to sell, inasmuch as he then holds the property for sale. Thus, according to the Fifth Circuit, the decision by an investor to sell his investment causes him to then hold the property for sale; and if his purpose was to realize the increased value of the property, his improvement, subdivision and sale of the property causes him to hold the property primarily for sale to customers in the ordinary course of his trade or business. This defective dialetic which runs through the cases from every Circuit makes it impossible for the courts to ever come to grips with the real question and contributes toward the chaotic condition of this area of the law.

The question in this and similar cases should turn on whether the property was held as an investment or whether it constituted inventory. In order to answer that question it will be necessary for the courts to have a definition of "property held for investment" in order to distinguish between property held for investment and property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such a definition, at the very least, should encompass an owner of real estate who purchases for market appreciation and who holds for a substantial period of time. Otherwise, large numbers of owners of appreciated real estate will be

denied the benefit of a tax provision which was enacted for their benefit.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

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APPENDIX

Appendix —

APPENDIX I

BIEDENHARN REALTY COMPANY, INC.
Plaintiff-Appellee,

v.

UNITED STATES of America,
Defendant-Appellant.

No. 73-3690

United States Court of Appeals,
Fifth Circuit.

January 26, 1976.

Appeal from the United States District Court for the Western District of Louisiana.

Before WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY and GEE, Circuit Judges.*

GOLDBERG, Circuit Judge:

The taxpayer-plaintiff, Biedenharn Realty Company, Inc. [Biedenharn], filed suit against the United States in May, 1971, claiming a refund for the tax years 1964, 1965, and 1966. In

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*Chief Judge Brown took no part in the consideration or decision of this case.

its original tax returns for the three years, Biedenharn listed profits of $254,409.47 from the sale of 38 residential lots. Taxpayer divided this gain, attributing 60% to ordinary income and 40% to capital gains.[1] Later, having determined that the profits from these sales were entirely ordinary income, the Internal Revenue Service assessed and collected additional taxes and interest. In its present action, plaintiff asserts that the whole real estate profit represents gain from the sale of capital assets and consequently that the Government is indebted to taxpayer for $32,006.86 in overpaid taxes. Reviewing the facts of this case in the light of our previous holdings and the directions set forth in this opinion, we reject plaintiff's claim and in so doing reverse the opinion of the District Court.

I.

Because of the confusing state of the record in this controversy and the resulting inconsistencies among the facts as stipulated by the

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1. A letter attached by the Realty Company to its tax forms in each year 1964-1966 suggests that the original 60/40 division represents the figures governing settlement of pre-1964 litigation between Biedenharn and the Internal Revenue Service. That settlement is not in issue here, and neither party to this controversy suggests that the previous suit has any impact on the present proceedings.

parties, as found by the District Court,[2] and as stated in the panel opinion,[3] we believe it useful to set out in plentiful detail the case's background and circumstances as best they can be ascertained.

A. The Realty Company. Joseph Biedenharn organized the Biedenharn Realty Company in 1923 as a vehicle for holding and managing the Biedenharn family's numerous investments. The original stockholders were all family members.[4] The investment company controls, among other interests, valuable commercial properties, a substantial stock portfolio, a motel, warehouses, a shopping center, residential real property, and farm property.

B. Taxpayer's Real Property Sales — The Hardtimes Plantation. Taxpayer's suit most directly involves its ownership and sale of lots from the 973 acre tract located near

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2. Biedenharn Realty Co. v. United States, 356 F.Supp. 1331 (W.D.La. 1973).

3. Biedenharn Realty Co. v. United States, 5 Cir. 1975, 509 F.2d 171.

4. Currently, B. W. Biedenharn is President of the Realty Company. Henry Biedenharn serves as Biedenharn's Vice-President/Manager.

Monroe, Louisiana, known as the Hardtimes Plantation. The plaintiff purchased the estate in 1935 for $50,000.00. B.W. Biedenharn, the Realty Company's president, testified that taxpayer acquired Hardtimes as a "good buy" for the purpose of farming and as a future investment. The plaintiff farmed the land for several years. Thereafter, Biedenharn rented part of the acreage to a farmer who Mr. Biedenharn suggested may presently be engaged in farming operations.[5]

1. The Three Basic Subdivisions. Between 1939 and 1966, taxpayer carved three basic subdivisions from Hardtimes — Biedenharn Estates, Bayou DeSiard Country Club Addition, and Oak Park Addition — covering approximately 185 acres.[6] During these years, Biedenharn sold

5. See note 43 infra.

6. In 1938, A.G. Siegfried, Inc., prepared a plat for all of the Hardtimes Plantation. B.W. Biedenharn testified that he thought that this particular plat was used only for a single 1939 sale. However, a copy of the blueprint read in conjunction with plaintiff's answers to interrogatories indicates that the Siegfried plat formed the basis for the entire first Biedenharn subdivision, Biedenharn Estates Unit 1, from which the Realty Company eventually sold 21 lots.

   Examination of the record reveals other instances of confusion and inconsistency among the plaintiff's interrogatories, exhibits,

208 subdivided Hardtimes lots in 158 sales, making a profit in excess of $800,000.00. These three basic subdivisions are the source of the contested 37 sales of 38 lots.[7] Their development and disposition are more fully discussed below.

a) Biedenharn Estates Unit 1, including 41.9 acres, was platted in 1938. Between 1939 and 1956, taxpayer apparently sold 21 lots

   briefs, and testimony with respect to dates, numbers of sales and lots, and subdivision activity. See, e.g., notes 8, 10, 11, 12, 18, 19 infra.

7. The 37 sales (1964-1966) break down as follows:

Biedenharn Estates Unit 2	2
Bayou DeSiard Country Club Addition	7
Oak Park Addition	28(29 lots)

In 1965, Biedenharn effected the sale of two additional properties, the Keller house and lot and 1.958 acres from Hardtimes. These sales are not in controversy here. All subdivisions except Biedenharn Estates Unit 1 are restricted to single family residences of at least 60% masonry construction and of not less than 1200 square feet exclusive of porches and carports.

in 9 sales.[8] Unit 2, containing 8.91 acres, was sold in 9 transactions between 1960 and 1965 and involved 10 lots.

(b) Bayou DeSiard Country Club Addition covering 61 acres, was subdivided in 1951, with remaining lots resubdivided in 1964. Approximately 73 lots were purchased in 64 sales from 1951 to 1966.[9]

(c) Oak Park Units 1 and 2 encompassed 75 acres. After subdivision in 1955 and resubdivision in 1960, plaintiff sold approximately 104 lots in 76 sales.

2. Additional Hardtimes Sales. Plaintiff lists at least 12 additional Hardtimes sales other than lots vended from the three basic subdivisions.

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8. Plaintiff's exhibit 2, reprinted at 356 F. Supp. 1331, 1337, enumerates twenty lots sold in seven transactions from Biedenharn Estates Unit 1. The District Court, perhaps misreading the chart, found only five transactions. Supra at 1332. Plaintiff's answers to interrogatories, apparently inconsistent with their exhibit 2 and with the District Court's finding, lists nine sales of 21 lots. Whatever the accurate factual resolution, any differences among the numbers are not so great as to alter our conclusions in the present case.

9. Plaintiff's exhibit 2 and answer to interrogatories specify 73 1/2 lots and 64 sales. The District Court found 68 1/2 lots sold in 64 transactions.

The earliest of these dispositions occurred in November, 1935, thirteen days after the Plantation's purchase. Ultimately totaling approximately 275 acres, most, but not all, of these sales involved large parcels of nonsubdivided land.

C. Taxpayer's Real Property Activity: Non-Hardtimes Sales. The 208 lots marketed from the three Hardtimes subdivisions represent only part of Biedenharn's total real property sales activities. Although the record does not in every instance permit exactitude, plaintiff's own submissions make clear that the Biedenharn Realty Company effectuated numerous non-Hardtimes retail real estate transactions. From the Company's formation in 1923 through 1966, the last year for which taxes are contested, taxpayer sold 934 lots. Of this total, plaintiff disposed of 249 lots before 1935 when it acquired Hardtimes. Thus, in the years 1935 to 1966, taxpayer sold 477 lots apart from its efforts with respect to the basic Hardtimes subdivisions. Biedenharn's year by year sales breakdown is attached as Appendix I of this opinion. That chart shows real estate sales in all but two years, 1932 and 1970, since the Realty Company's 1923 inception.[10]

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10. The plaintiff's answer to interrogatory 26 [Appendix I] indicates 1,095 lots sold between 1923 and 1971. The record does not permit correlation of the interrogatory 26 figures with the individual lot and sales breakdowns

Unfortunately, the record does not unambiguously reveal the number of sales as opposed to the number of lots involved in these dispositions. Although some doubt exists as to the actual sales totals, even the most conservative reading of the figures convinces us of the frequency and abundance of the non-Hardtimes sales. [11] For example, from 1925 to 1958,

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provided for each tract of land. However, when the Government questioned Henry Biedenharn about the correctness of the figures, plaintiff's attorney intervened to stipulate to their accuracy. Interrogatory 26 further indicates that from these 1,095 lots sold, plaintiff realized a net profit of $1,509,860.25 on gross sales of $2,045,418.19. We are not told the extent to which taxpayer received capital gains treatment with respect to these sales. But see note 1 supra.

11. In reviewing the interrogatory 26 numbers, see note 10 supra, we have kept in mind that single sales in 1947, 1971, and perhaps other years, see also note 12 infra, accounted for large numbers of the lots disposed in those years. Notwithstanding the difficulty such multiple lot sales create in accurately evaluating the numbers, the record easily evidences sufficient individual sales of single lots to support our determination with respect to the frequency and substantiality of Biedenharn's real estate activities.

Biedenharn consummated from its subdivided Owens tract a minimum of 125, but perhaps upwards of 300, sales (338 lots). [12] Eighteen sales accounted for 20 lots sold between 1923 and 1958 from Biedenharn's Cornwall property. Taxpayer's disposition from 1927 to 1960 of its Corey and Cabeen property resulted in at least 50 sales. Plaintiff made 14 sales from its Thomas Street lots between 1937 and 1955. Moreover, Biedenharn has sold over 20 other properties, a few of them piecemeal, since 1923.

Each of these parcels has its own history. Joseph Biedenharn transferred much of the land to the Realty Company in 1923. The company acquired other property through purchases and various forms of foreclosure. Before sale, Biedenharn held some tracts for commercial or residential rental. Taxpayer originally had slated the Owen acreage for transfer in bulk to the Owens-Illinois Company. Also, the length of time between acquisition and disposition differed

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12. On its individual sales breakdown sheet for the Owens tract, taxpayer provided only gross lot figures for the period before 1930. As a result, it is uncertain, for example, whether taxpayer's answer that in 1925 "17 lots" were marketed from that subdivision indicates 1, 17, or some intermediate number of sales in that year. As noted above, taking the most conservative view and considering these lumped figures as single sales the Owens property accounts for at least 125 separate sales.

significantly among pieces of realty. However, these variations [13] in the background of each plot and the length of time and original purpose [14] for which each was obtained do not alter the fact that the Biedenharn Realty Company regularly sold substantial amounts of subdivided and improved real property, and further, that these sales were not confined to the basic Hardtimes subdivisions.[15]

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13. Of the four non-Hardtimes tracts specifically mentioned above, three were capital contributions from J. A. Biedenharn. The Thomas Street lots were acquired through the purchase of distressed paving certificates. Prior owners subdivided the Thomas and Cornwall properties although Biedenharn Realty improved the latter land with streets and drainage. Previous owners also originally platted the Corey and Cabeen property, but plaintiff later further platted part of this tract. Three dwellings comprised plaintiff's Corey and Cabeen improvements. Taxpayer platted the Owens site and added improvements including streets and drainage.

14. The Government nowhere contends that the Realty Company acquired any of these properties with the initial intention of subdivision and resale.

15. The District Court briefly discussed the history of the Owens tract, 356 F.Supp. at 1333, but did not really make findings with respect to the non-Hardtimes sales. The panel

D. Real Property Improvements. Before selling the Hardtimes lots, Biedenharn improved the land, adding in most instances streets, drainage, water, sewerage, and electricity. The total cost of bettering the Plantation acreage exceeded $200,000 and included $9,519.17 for Biedenharn Estates Unit 2, [16] $56,879.12 for Bayou DeSiard Country Club Addition, and $141,579.25 for the Oak Park Addition.

E. Sale of the Hardtimes Subdivisions. Bernard Biedenharn testified that at the time of the Hardtimes purchase, no one foresaw that the land would be sold as residential property in the future. Accordingly, the District Court found, and we do not disagree, that Biedenharn bought Hardtimes for investment. Later, as the City of Monroe expanded northward, the Plantation became valuable residential property. The Realty Company staked off the Bayou DeSiard subdivision so that prospective purchasers could

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opinion observed "it is fair to say it [Biedenharn] does not have a significant history of acquiring and subdividing other tracts of land." 509 F.2d at 172. Although in some instances prior owners undertook the original platting, see note 13 supra, we stand by our analysis above and its conclusion that Biedenharn had substantial and frequent non-Hardtimes sales.

16. Taxpayer recorded the cost of improving Biedenharn Estates Unit 1 (only streets) as "unknown."

see what the lots "looked like." As demand increased, taxpayer opened the Oak Park and Biedenharn Estates Unit 2 subdivisions and resubdivided the Bayou DeSiard section. Taxpayer handled all Biedenharn Estates and Bayou DeSiard sales. [17] Independent realtors disposed of many of the Oak Park lots. Mr. Herbert Rosenhein, a local broker, sold Oak Park Unit 1 lots. Gilbert Faulk, a real estate agent, sold from Oak Park Unit 2. Of the 37 sales consummated between 1964 and 1966, Henry Biedenharn handled at least nine transactions (Biedenharn Estates (2) and Bayou DeSiard (7)) while "independent realtors" effected some, if not all, of the other 28 transactions (Oak Park Unit 2). [18] Taxpayer

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17. The panel opinion, 509 F.2d at 173, erroneously suggests that independent agents took charge of all sales.

18. The 9/28 division for the 1964-1966 sales comes from plaintiff's brief. However, Mr. Faulk, the only agent listed in taxpayer's answer to interrogatories as having sold Oak Park Unit 2 properties, testified that the Realty Company hired him only in 1965. A memorandum prepared by Faulk immediately after Biedenharn had engaged the former's services, is dated November 22, 1965. Presumably, some one other than Mr. Faulk, perhaps Henry Biedenharn, handled the eleven lots listed in plaintiff's answer as having been sold from Oak Park before November, 1965. If so, Mr. Biedenharn would have sold eleven Oak Park lots as well as nine lots from the other subdivisions, leaving only 18 pre-1967 sales attributable to the independent broker, Mr. Faulk. An additional inconsistency arises from Plaintiff's Proposed Findings of Fact wherein taxpayer states that "24 of those [the thirty-seven 1964-1966] sales were made by independent agents." Similarly confusion appears in the record as to who sold certain portions of the Oak Park Unit 1 properties.

delegated significant responsibilities to these brokers. In its dealings with Faulk, Biedenharn set the prices, general credit terms, and signed the deeds. Details, including specific credit decisions and advertising, devolved to Faulk, who utilized on-site signs and newspapers to publicize the lots.

In contrast to these broker induced dispositions, plaintiff's non-brokered sales [19] resulted after unsolicited individuals approached Realty Company employees with inquiries about prospective purchases. At no time did the plaintiff hire its own real estate salesmen or engage in formal advertising. Apparently, the lands' prime location and plaintiff's subdivision activities constituted sufficient notice to interested

19. The record is not clear, but it appears that the Trentman Company, realtors, made the initial sales from the Owens tract (1925) and that thereafter, with the exception of Oak Park, discussed above, all Biedenharn sales were managed exclusively by the Realty Company.

persons of the availability of Hardtimes lots. Henry Biedenharn testified:

> [O]nce we started improving and putting roads and streets in people would call us up and ask you about buying a lot and we would sell a lot if they wanted it.

The Realty Company does not maintain a separate place of business but instead offices at the Biedenharn family's Ouachita Coca-Cola bottling plant. A telephone, listed in plaintiff's name, rings at the Coca-Cola building. Biedenharn has four employees: a camp caretaker, a tenant farmer, a bookkeeper and a manager. The manager, Henry Biedenharn, Jr., devotes approximately 10% of his time to the Realty Company, mostly collecting rents and overseeing the maintenance of various properties. The bookkeeper also works only part-time for plaintiff. Having set out these facts, we now discuss the relevant legal standard for resolving this controversy.

II.

The determination of gain as capital or ordinary is controlled by the language of the Internal Revenue Code. The Code defines capital asset, the profitable sale or exchange of which generally results in capital gains, as "property held by the taxpayer." 26 U.S.C. § 1221. Many exceptions limit the enormous breadth of this congressional description and

consequently remove large numbers of transactions from the privileged realm of capital gains. In this case, we confront the question whether or not Biedenharn's real estate sales should be taxed at ordinary rates because they fall within the exception covering "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." 26 U.S.C. § 1221(1). [20]

The problem we struggle with here is not novel. We have become accustomed to the frequency with which taxpayers litigate this troublesome question. Chief Judge Brown appropriately described the real estate capital gains-ordinary income issue as "old, familiar, recurring, vexing and ofttimes elusive." Thompson v. Commissioner of Internal Revenue, 5 Cir. 1963, 322 F.2d 122, 123. The difficulty in large part stems from ad-hoc application of the numerous permissible criteria set forth in our multitudinous prior opinions. [21] Over the past 40 years, this case by case approach with its concentration on the facts of each suit has resulted in a collection of decisions not always reconcilable. Recognizing the

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20. Neither party contends, nor do we find, that Internal Revenue Code § 1237, guaranteeing capital gains treatment to subdividing taxpayers in certain instances, is applicable to the facts of this suit.

21. One finds evidence of the vast array of opinions and factors discussed therein by briefly perusing the 24 small-type, double column pages of Prentice-Hall's Federal

situation, we have warned that efforts to distinguish and thereby make consistent the Court's previous holdings must necessarily be "foreboding and unrewarding." Thompson, supra at 127. See Williams v. United States, 5 Cir. 1964, 329 F.2d 430, 431. Litigants are cautioned that "each case must be decided on its own peculiar facts. * * *Specific factors, or combinations of them are not necessarily controlling." Thompson, supra at 127; Wood v. Commissioner of Internal Revenue, 5 Cir. 1960, 276 F.2d 586, 590; Smith v. Commissioner of Internal Revenue, 5 Cir. 1956, 232 F.2d 142, 144. Nor are these factors the equivalent of the philosopher's stone, separating "sellers garlanded with capital gains from those beflowered in the garden of ordinary income." United States v. Winthrop, 5 Cir. 1969, 417 F.2d 905, 911.

Assuredly, we would much prefer one or two clearly defined, easily employed tests which lead to predictable, perhaps automatic, conclusions. However, the nature of the congressional "capital asset" definition and the myriad situations to which we must apply that standard make impossible any easy escape from the task before

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Taxation 32,386 which lists the cases involving subdivided realty. See also 33 Mertens, The Law of Federal Income Taxation §§ 22.138-22.142 (Malone Rev.). The Second Circuit has called these judicial pronouncements "legion." Gault v. Commissioner of Internal Revenue, 2 Cir. 1964, 332 F.2d 94, 95.

us. No one set of criteria is applicable to all economic structures. Moreover, within a collection of tests, individual factors have varying weights and magnitudes, depending on the facts of the case. The relationship among the factors and their mutual interaction is altered as each criteria increases or diminishes in strength, sometimes changing the controversy's outcome. As such, there can be no mathematical formula capable of finding the X of capital gains or ordinary income in this complicated field.

Yet our inability to proffer a panaceatic guide to the perplexed with respect to this subject does not preclude our setting forth some general, albeit inexact, guidelines for the resolution of many of the § 1221(1) cases we confront. This opinion does not purport to reconcile all past precedents or assure conflict-free future decisions. Nor do we hereby obviate the need for ad-hoc adjustments when confronted with close cases and changing factual circumstances. Instead, with the hope of clarifying a few of the area's mysteries, we more precisely define and suggest points of emphasis for the major Winthrop delineated factors[22] as they appear in the

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22. In United States v. Winthrop, 5 Cir. 1969, 417 F.2d 905, 910, the Court enumerated the following factors:

(1) the nature and purpose of the acquisition of the property and the duration of the ownership; (2) the extent and nature of the taxpayer's efforts to sell the property;

instant controversy. In so doing, we devote particular attention to the Court's recent opinions in order that our analysis will reflect, insofar as possible, the Circuit's present trends.

III.

We begin our task by evaluating in the light of Biedenharn's facts the main Winthrop[23] factors—substantiality and frequency of sales, improvements, solicitation and advertising efforts, and brokers' activities—as well as a few miscellaneous contentions. A separate section follows discussing the keenly contested role of prior investment intent. Finally, we consider the significance of the Supreme Court's decision

(3) the number, extent, continuity and substantiality of the sales; (4) the extent of subdividing, developing, and advertising to increase sales; (5) the use of a business office for the sale of the property; (6) the character and degree of supervision or control exercised by the taxpayer over any representative selling the property; (7) the time and effort the taxpayer habitually devoted to the sales.

The numbering indicates no hierachy of importance.

23. See note 22 supra. For purposes of this decision, we have resummarized the Winthrop factors as noted above.

in Malat v. Riddell.[24]

A. Frequency and Substantiality of Sales

[1, 2] Scrutinizing closely the record and briefs, we find that plaintiff's real property sales activities compel an ordinary income conclusion.[25] In arriving at this result, we examine first the most important of Winthrop's factors—the frequency and substantiality of taxpayer's sales. Although frequency and substantiality of sales are not usually conclusive, they occupy the preeminent ground in our analysis. The recent trend of Fifth Circuit decisions indicates that when dispositions of subdivided property extend over a long period of time and are especially numerous, the likelihood of capital gains is very slight indeed. See United States v. Winthrop, 5 Cir. 1969,

24. 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed. 2d 102 (1966).

25. Our power to review the District Court's ultimate legal determination that taxpayer did not hold property "primarily for sale to customers in the ordinary course of his trade or business" is plenary and not limited by the clearly erroneous rule. See United States v. Winthrop, 5 Cir. 1969, 417 F.2d 905, 910; Thomas v. Commissioner of Internal Revenue, 5 Cir. 1958, 254 F.2d 233, 236. See also United States v. Temple, 5 Cir. 1966, 355 F.2d 67, 68 (Wisdom, J. dissenting).

417 F.2d 905; Thompson v. Commissioner of Internal Revenue, 5 Cir. 1963, 322 F.2d 122. Conversely, when sales are few and isolated, the taxpayer's claim to capital gain is accorded greater deference. Cf. Gamble v. Commissioner of Internal Revenue, 5 Cir. 1957, 242 F.2d 586,591; Brown v. Commissioner of Internal Revenue, 5 Cir. 1944, 143 F.2d 468, 470.

[3] On the present facts, taxpayer could not claim "isolated" sales or a passive and gradual liquidation. See Gamble supra; Dunlap v. Oldham Lumber Company, 5 Cir. 1950, 178 F.2d 781, 784; Brown supra. Although only three years and 37 sales (38 lots) are in controversy here, taxpayer's pre-1964 sales from the Hardtimes acreage as well as similar dispositions from other properties are probative of the existence of sales "in the ordinary course of his trade or business." See Levin, Capital Gains Or Income Tax on Real Estate Sales, 37 B.U.L. Rev. 165, 170 & n.29 (1957). Cf. Snell v. Commissioner of Internal Revenue, 5 Cir. 1938, 97 F.2d 891. As Appendix I indicates, Biedenharn sold property, usually a substantial number of lots, in every year, save one, from 1923 to 1966. Biedenharn's long and steady history of improved lot sales at least equals that encountered in Thompson v. Commissioner of Internal Revenue, 5 Cir. 1963, 322 F.2d 122, where also we noted the full history of real estate activity.[26] Supra at 124-25. There taxpayer lost on a finding that he had sold 376 1/2

26. Similarly, see Winthrop, supra at 907.

lots over a 15 year span—this notwithstanding that overall the other sales indicia were more in taxpayer's favor than in the present case. Moreover, the contested tax years in that suit involved only ten sales (28 lots); yet we labeled that activity "substantial." Supra at 125.

The frequency and substantiality of Biedenharn's sales go not only to its holding purpose and the existence of a trade or business but also support our finding of the ordinariness with which the Realty Company disposed of its lots. These sales easily meet the criteria of normalcy set forth in Winthrop, supra at 912.

Furthermore, in contrast with Goldberg v. Commissioner of Internal Revenue, 5 Cir. 1955, 223 F.2d 709, 713, where taxpayer did not reinvest his sales proceeds, one could fairly infer that the income accruing to the Biedenharn Realty Company from its pre-1935 sales helped support the purchase of the Hardtimes Plantation. Even if taxpayer made no significant acquisitions after Hardtimes,[27] the "purpose, system, and continuity of Biedenharn's efforts easily constitute a business. See Snell, supra at 893; Brown, supra at 470. As we said in Snell, supra:

27. Plaintiff's answers to interrogatories indicate recent purchases of undeveloped realty including 2360 acres of timber land (1971), 3.7 acres at a proposed interstate highway intersection (1967), and a small lot adjacent to a shopping center (1968). Plaintiff also lists a number of post-1935 acquisitions, many of which are still held by the Realty Company.

> The fact that he bought no additional lands during this period does not prevent his activities being a business. He merely had enough land to do a large business without buying any more.

Citing previous Fifth Circuit decisions including Goldberg v. Commissioner of Internal Revenue, 5 Cir. 1955, 223 F.2d 709, 713, and Ross v. Commissioner of Internal Revenue, 5 Cir. 1955, 227 F.2d 265, 268, the District Court sought to overcome this evidence of dealer-like real estate activities and property "primarily held for sale" by clinging to the notion that the taxpayer was merely liquidating a prior investment. We discuss later the role of former investment status and the possibility of taxpayer relief under that concept. Otherwise, the question of liquidation of an investment is simply the opposite side of the inquiry as to whether or not one is holding property primarily for sale in the ordinary course of his business. In other words, a taxpayer's claim that he is liquidating a prior investment does not really present a separate theory but rather restates the main question currently under scrutiny. To the extent the opinions cited by the District Court might create a specially protected "liquidation" niche, [28] we believe that the present case, with taxpayer's energetic subdivision activities and consummation of numerous retail property

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28. See section IV infra.

dispositions, is governed by our more recent decision in Thompson v. Commissioner of Internal Revenue, supra at 127-28. There, the Court observed:

> The liquidation, if it really is that, may therefore be carried out with business efficiency. Smith v. Commissioner of Internal Revenue, 5 Cir. 1956, 232 F.2d 142, 145. But what was once an investment, or what may start out as a liquidation of an investment, may be something else. The Tax Court was eminently justified in concluding that this took place here. It was a regular part of the trade or business of Taxpayer to sell these lots to any and all comers who would meet his price. From 1944 on when the sales commenced, there is no evidence that he thereafter held the lots for any purpose other than the sale to prospective purchasers. It is true that he testified in conclusory terms that he was trying to "liquidate" but on objective standards the Tax Court could equate held solely with "held primarily." And, of course, there can be no question at all that purchasers of these lots were "customers" and that whether we call Taxpayer a "dealer" or a "trader", a real estate man or otherwise, the continuous sales of these lots down to the point of exhaustion was a regular and ordinary (and profitable) part of his business activity.

See Ackerman v. United States, 5 Cir. 1964, 335 F.2d 521, 524-25; Brown, supra at 470.

B. Improvements

Although we place greatest emphasis on the frequency and substantiality of sales over an extended time period, our decision in this instance is aided by the presence of taxpayer activity—particularly improvements—in the other Winthrop areas. Biedenharn vigorously improved its subdivisions, generally adding streets, drainage, sewerage, and utilities. These alterations are comparable to those in Winthrop, supra at 906, except that in the latter case taxpayer built five houses. We do not think that the construction of five houses in the context of Winthrop's 456 lot sales significantly distinguishes that taxpayer from Biedenharn. In Barrios Estate v. Commissioner of Internal Revenue, 5 Cir., 1959, 265 F.2d 517, 520, heavily relied on by plaintiff, the Court reasoned that improvements constituted an integral part of the sale of subdivided realty and were therefore permissible in the context of a liquidating sale. As discussed above, Biedenharn's activities have removed it from any harbor of investment liquidation. Moreover, the additional sales flexibility permitted the Barrios Estate taxpayer might be predicated on the forced change of purpose examined in section IV. Finally, in Thompson, supra, the plaintiff's only activities were subdivision and improvement. Yet, not availing ourselves of the opportunity to rely on a Barrios Estate type "liquidation plus integrally

related improvements theory," we found no escape from ordinary income.

C. Solicitation and Advertising Efforts

Substantial, frequent sales and improvements such as we have encountered in this case will usually conclude the capital gains issue against taxpayer. See, e.g., Thompson, supra. Thus, on the basis of our analysis to this point, we would have little hesitation in finding that taxpayer held "primarily for sale" in the "ordinary course of [his] trade or business." "[T]he flexing of commercial muscles with frequency and continuity, design and effect" of which Winthrop spoke, supra at 911, is here a reality. This reality is further buttressed by Biedenharn's sales efforts, including those carried on through brokers.[29] Minimizing the importance of its own sales activities, taxpayer points repeatedly to its steady avoidance of advertising or other solicitation of customers. Plaintiff directs our attention to stipulations detailing the population growth of Monroe and testimony outlining the economic forces which made Hardtimes Plantation attractive residential property and presumably eliminated the need for sales exertions. We have no quarrel with plaintiff's description of this familiar process of suburban expansion, but we cannot accept the legal inferences which taxpayer would have us draw.

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29. See section III. D. infra.

[4] The Circuit's recent decisions in Thompson, supra at 124-26, and Winthrop, supra at 912, implicitly recognize that even one inarguably in the real estate business need not engage in promotional exertions in the face of a favorable market. As such, we do not always require a showing of active solicitation where "business . . . [is] good, indeed brisk," Thompson, supra at 124, and where other Winthrop factors make obvious taxpayer's ordinary trade or business status. See also Levin, supra at 190. Plainly, this represents a sensible approach. In cases such as Biedenharn, the sale of a few lots and the construction of the first homes, albeit not, as in Winthrop, by the taxpayer, as well as the building of roads, addition of utilities, and staking off of the other subdivided parcels constitute a highly visible form of advertising. Prospective home buyers drive by the advantageously located property, see the development activities, and are as surely put on notice of the availability of lots as if the owner had erected large signs announcing "residential property for sale."[30] We do not by this evaluation automatically neutralize advertising or solicitation as a factor in our analysis. This form of inherent notice is not present in all land sales, especially where the property is not so valuably located, is not subdivided into small

30. Henry Biedenharn testified that the greatest number of inquiries from lot shoppers occur "whenever you start putting in improvements."

lots, and is not improved. Moreover, inherent notice represents only one band of the solicitation spectrum. Media utilization and personal initiatives remain material components of this criterion. When present, they call for greater Government oriented emphasis on Winthrop's solicitation factor.

D. Brokerage Activities

In evaluating Biedenharn's solicitation activities, we need not confine ourselves to the Thompson-Winthrop theory of brisk sales without organizational efforts. Unlike in Thompson and Winthrop where no one undertook overt solicitation efforts, the Realty Company hired brokers, who, using media and on site advertising, worked vigorously on taxpayer's behalf. We do not believe that the employment of brokers should shield plaintiff from ordinary income treatment. See Gamble v. Commissioner of Internal Revenue, 5 Cir. 1957, 242 F.2d 586, 592; Brown, supra at 470; Snell v. Commissioner of Internal Revenue, 5 Cir. 1938, 97 F.2d 891, 892-93; Cf. McFaddin v. Commissioner of Internal Revenue, 5 Cir. 1945, 148 F.2d 570, 571. See also Levin, supra at 193-94. Their activities should at least in discounted form be attributed to Biedenharn. To the contrary, taxpayer argues that "one who is not already in the trade or business of selling real estate does not enter such business when he employs a broker who acts as an independent contractor. Fahs v. Crawford, 161 F.2d 315 (5 Cir. 1947); Smith v. Dunn, 224 F. 2d 353 (5 Cir. 1955)." Without presently

entangling ourselves in a dispute as to the differences between an agent and an independent contractor, see generally Levin, supra, we find the cases cited distinguishable from the instant circumstances. In both Fahs and Smith, the taxpayer turned the entire property over to brokers who, having been granted total responsibility, made all decisions, including the setting of sales prices. [31] In comparison, Biedenharn determined original [32] prices and general credit policy. Moreover, the Realty Company did not make all the sales in question through brokers as did taxpayers in Fahs and Smith. [33] Biedenharn sold the Bayou DeSiard and Biedenharn Estates lots and may well have sold some of the Oak Park land. [34] In other words, unlike Fahs and Smith,

31. Taxpayer in Fahs received the lot's appraised value, all other price risk and presumably price control having been shifted to the broker.

32. One of the brokers testified that he "advance[d] prices as the market ascended."

33. Also, Henry Biedenharn stated that he kept a list of prospective buyers who had contacted him. When the Realty Company eventually hired a broker, Mr. Biedenharn provided the latter with these names.

34. See note 18 supra.

Biedenharn's brokers did not so completely take charge of the whole of the Hardtimes sales as to permit the Realty Company to wall itself off legally from their activities.

E. Additional Taxpayer Contentions

Plaintiff presents a number of other contentions and supporting facts for our consideration. Although we set out these arguments and briefly discuss them, their impact, in the face of those factors examined above, must be minimal. Taxpayer emphasizes that its profits from real estate sales averaged only 11.1% in each of the years in controversy, compared to 52.4% in Winthrop. Whatever the percentage, plaintiff would be hard pressed to deny the substantiality of its Hardtimes sales in absolute terms (the subdivided lots alone brought in over one million dollars) or, most importantly, to assert that its real estate business was too insignificant to constitute a separate trade or business. [35]

The relatively modest income share represented by Biedenharn's real property dispositions

35. This Court has repeatedly recognized that a taxpayer may have more than one trade or business for purposes of Internal Revenue Code § 1221(1). See, e.g., Ackerman v. United States, 5 Cir. 1964, 335 F.2d 521, 524; Gamble v. Commissioner of Internal Revenue, 5 Cir. 1957, 242 F.2d 586, 591; Fahs v. Crawford, 5 Cir. 1947, 161 F.2d 315, 317.

stems not from a failure to engage in real estate sales activities but rather from the comparatively large profit attributable to the Company's 1965 ($649,231.34) and 1966 ($688,840.82) stock sales. The fact of Biedenharn's holding, managing, and selling stock is not inconsistent with the existence of a separate realty business. If in the face of taxpayer's numerous real estate dealings this Court held otherwise, we would be sanctioning special treatment for those individuals and companies arranging their business activities so that the income accruing to real estate sales represents only a small fraction of the taxpaying entity's total gains.

Similarly, taxpayer observes that Biedenharn's manager devoted only 10% of his time to real estate dealings and then mostly to the company's rental properties. This fact does not negate the existence of sales activities. Taxpayer had a telephone listing, a shared business office, and a few part-time employees. Because, as discussed before, a strong seller's market existed, [36] Biedenharn's sales required less than the usual time. Moreover, plaintiff, unlike taxpayers in Winthrop, supra and Thompson, supra, hired brokers to handle many aspects of the Hard-times transactions—thus further reducing the activity and time required of Biedenharn's employees.

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36. See Section III. C. supra.

Finally, taxpayer argues that it is entitled to capital gains since its enormous profits (74% to 97%) demonstrate a return based principally on capital appreciation and not on taxpayer's "merchandising" efforts. We decline the opportunity to allocate plaintiff's gain between long-term market appreciation and improvement related activities. See generally S. Surrey, W. Warren, P. McDaniel, H. Ault, 1 Federal Income Taxation 1012 (1972). Even if we undertook such an analysis and found the former element predominant, we would on the authority of Winthrop, supra at 907-908, reject plaintiff's contention which, in effect, is merely taxpayer's version of the Government's unsuccessful argument in that case. [37]

IV.

[5] The District Court found that "[t]axpayer is merely liquidating over a long period of time a substantial investment in the most advantageous method possible." 356 F.Supp. at 1336.

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37. In Galena Oaks Corp. v. Scofield, 5 Cir., 1954, 218 F.2d 217, 220, the Court said: "Congress intended to alleviate the burden on a taxpayer whose property has increased in value over a long period of time. When, however, such a taxpayer endeavors still further to increase his profits by engaging in a business separable from his investment, it is not unfair that his gain should be taxed as ordinary income."

In this view, the original investment intent is crucial, for it preserves the capital gains character of the transaction even in the face of normal real estate sales activities.

The Government asserts that Biedenharn Realty Company did not merely "liquidate" an investment but instead entered the real estate business in an effort to dispose of what was formerly investment property. Claiming that Biedenharn's activities would result in ordinary income if the Hardtimes Plantation had been purchased with the intent to divide and resell the property, and finding no reason why a different prior intent should influence this outcome, [38] the Government concludes that original investment purpose is irrelevant. Instead, the Government would have us focus exclusively on taxpayer's intent and the level of sales activity during the period commencing with subdivision and improvement and lasting through final sales. Under this theory, every individual who improves and frequently sells substantial numbers of land parcels would receive ordinary income. [39]

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38. The Government emphasizes the "unfairness" of two taxpayers engaging in equal sales efforts with respect to similar tracts of land but receiving different tax treatment because of divergent initial motives.

39. The Government suggests that taxpayer can avoid ordinary income treatment by selling the undivided, unimproved tract to a controlled corporation which would then develop the land. However, this approach would in many instances create attribution problems with the Government arguing that the controlled corporation's sales are actually those of the taxpayer. See, e. g. Ackerman v. United States, 5 Cir. 1964, 335 F.2d 521, 527-528. Furthermore, we are not prepared to tell taxpayers that in all cases a single bulk sale provides the only road to capital gains.

While the facts of this case dictate our agreement with the Internal Revenue Service's ultimate conclusion of taxpayer liability, they do not require our acquiescence in the Government's entreated total elimination of Winthrop's first criterion, "the nature and purpose of the acquisition." Undoubtedly, in most subdivided-improvement situations, an investment purpose of antecedent origin will not survive into a present era of intense retail selling. The antiquated purpose, when overborne by later, but substantial and frequent selling activity, will not prevent ordinary income from being visited upon the taxpayer. See, e.g. Ackerman v. United States, 5 Cir. 1964, 335 F.2d 521; Thompson v. Commissioner of Internal Revenue, 5 Cir. 1963, 322 F.2d 122; Galena Oaks Corp. v. Scofield, 5 Cir. 1954, 218 F.2d 217; Brown v. Commissioner of Internal Revenue, 5 Cir. 1944, 143 F.2d 468. Generally, investment purpose has no built-in perpetuity nor a guarantee of capital gains forevermore. Precedents, however, in certain circumstances have permitted landowners with

earlier investment intent to sell subdivided property and remain subject to capital gains treatment. See, e.g., Cole v. Usry, 5 Cir. 1961, 294 F.2d 426; Barrios Estate v. Commissioner of Internal Revenue, 5 Cir. 1959, 265 F.2d 517; Smith v. Dunn, 5 Cir. 1955, 224 F.2d 353.

The Government, attacking these precedents, argues that the line of cases decided principally in the 1950's represented by Barrios Estate, supra; Goldberg v. Commissioner of Internal Revenue, 5 Cir. 1955, 223 F.2d 709; Ross v. Commissioner of Internal Revenue, 5 Cir. 1955, 227 F.2d 265 and including United States v. Temple, 5 Cir. 1966, 355 F.2d 67, are inconsistent with our earlier holdings in Galena Oaks Corp., supra; White v. Commissioner of Internal Revenue, 5 Cir. 1949, 172 F.2d 629; Brown, supra, and the trend of our most recent decisions in Ackerman, supra, Thompson, supra and including Judge Wisdom's dissent in Temple, supra. Because of the ad-hoc nature of these previous decisions and the difficulty of determining in each instance the exact combination of factors which placed a case on one side or the other of the capital gains-ordinary income boundary, we are loath to overrule any of these past decisions. In a sense, we adhere to our own admonitions against efforts at reconciling and making consistent all that has gone before in the subdivided realty area. But in so avoiding a troublesome and probably unrewarding task, we are not foreclosed from the more important responsibility of giving future direction

with respect to the much controverted role of prior investment intent, nor are we precluded from analyzing that factor's impact in the context of the present controversy.

We reject the Government's sweeping contention that prior investment intent is always irrelevant. There will be instances where an initial investment purpose endures in controlling fashion notwithstanding continuing sales activity. We doubt that this aperture, where an active subdivider and improver receives capital gains, is very wide. Yet we believe it exists. We would most generally find such an opening where the change from investment holding to sales activity results from unanticipated, externally induced factors which make impossible the continued pre-existing use of the realty. Barrios Estate, supra, is such a case. There the taxpayer farmed the land until drainage problems created by the newly completed intercoastal canal rendered the property agriculturally unfit. The Court found that taxpayer was "dispossessed of the farming operation through no act of her own." Supra at 518. Similarly, Acts of God, condemnation of part of one's property, new and unfavorable zoning regulations, or other events forcing alteration of taxpayer's plans create situations making possible subdivision and improvement as a part of a capital gains disposition. [40]

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40. A Boston University Law Review article canvassing factors inducing involuntary changes of purpose in subdivided realty

However, cases of the ilk of Ackerman, supra, Thompson, supra, and Winthrop, supra, remain unaffected in their ordinary income conclusion. There, the transformations in purpose were not coerced. Rather, the changes ensued from taxpayers' purely voluntary responses to increased economic opportunity—albeit at times externally created[41]—in order to enhance their gain through the subdivision, improvement, and sale of lots. Thus reinforced by the trend of these recent decisions, we gravitate toward the Government's view in instances of willful taxpayer change of purpose and grant the taxpayer

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cases enumerates among others the following: a pressing need for funds in general, illness or old age or both, the necessity for liquidating a partnership on the death of a partner, the threat of condemnation, and municipal zoning restrictions. Levin, Capital Gains or Income Tax on Real Estate Sales, 37 B. U. L. Rev. 1965, 194-95 (1957). Although we might not accept all of these events as sufficient to cause an outcome favorable to taxpayer, they are suggestive of the sort of change of purpose provoking events delineated above as worthy of special consideration.

41. For example, in Thompson, supra, taxpayer's motivation undoubtedly was the increase in value created by the wartime boom in Borger, Texas. Biedenharn itself would fall within this category.

little, if any, benefit from Winthrop's first criterion in such cases.

The distinction drawn above reflects our belief that Congress did not intend to automatically disqualify from capital gains bona fide investors forced to abandon prior purposes for reasons beyond their control. At times, the Code may be severe, and this Court may construe it strictly, but neither Code nor Court is so tyrannical as to mandate the absolute rule urged by the Government. However, we caution that although permitting a land owner substantial sales flexibility where there is a forced change from original investment purpose, we do not absolutely shield the constrained taxpayer from ordinary income. That taxpayer is not granted carte blanche to undertake intensely all aspects of a full blown real estate business. Instead, in cases of forced change of purpose, we will continue to utilize the Winthrop analysis discussed earlier but will place unusually strong taxpayer-favored emphasis on Winthrop's first factor.

Clearly, under the facts in this case, the distinction just elaborated undermines Biedenharn's reliance on original investment purpose. Taxpayer's change of purpose was entirely voluntary and therefore does not fall within the protected area. Moreover, taxpayer's original investment intent, even if considered a factor sharply supporting capital gains treatment, is so overwhelmed by the other Winthrop factors discussed supra, that that element can have no decisive effect. However wide the capital gains

passageway through which a subdivider with former investment intent could squeeze, the Biedenharn Realty Company will never fit.

V.

The District Court, citing Malat v. Riddell, 1966, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102, stated that "the lots were not held . . . primarily for sale as that phrase was interpreted . . . in Malat . . . ." 356 F.Supp. at 1335.[42] Finding that Biedenharn's primary purpose became holding for sale and consequently that Malat in no way alters our analysis here, we disagree with the District Court's conclusion. Malat was a brief per curiam in which the Supreme Court decided only that as used in Internal Revenue Code § 1221(1) the word "primarily" means "principally," "of first importance." The Supreme Court, remanding the case, did not analyze the facts or resolve the controversy which involved a real estate dealer who had purchased land and held it at the time of sale with the dual intention of developing it as rental property or selling it, depending on whichever

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42. For discussions of Malat see generally Bernstein, "Primarily for Sale"; A Semantic Snare, 20 Stan. L.Rev. 1093 (1968); Note, "Primarily for Sale" in I.R.C. Sections 1221 and 1231 Held to Mean "Principally for Sale" Rather than "Substantially for Sale"—Malat v. Riddell, 64 Mich. L.Rev. 1611 (1966).

proved to be the more profitable. Malat v. Riddell, 9 Cir. 1965, 347 F.2d 23, 26. In contrast, having substantially abandoned its investment and farming[43] intent, Biedenharn was cloaked primarily in the garb of sales purpose when it disposed of the 38 lots here in controversy. With this change the Realty Company lost the opportunity of coming within any dual purpose analysis.[44]

[6] We do not hereby condemn to ordinary income a taxpayer merely because, as is usually true, his principal intent at the exact moment of

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43. The District Court found that Biedenharn "is still farming a large part of the land . . . ." 356 F.Supp. at 1336. The record suggests neither that Biedenharn as opposed to a lessee currently farms on the Hardtimes Plantation nor that the magnitude of that lessee's farming operations is substantial. More importantly, the District Court did not find and the plaintiff does not assert that Biedenharn simultaneously held the subdivided land for sale and for farming either before or at the time of disposition. Taxpayer claims no dual purpose.

44. See Bynum v. Commissioner of Internal Revenue, 46 T.C. 295, 299 (1966); Cf. Continental Can Co. v. United States, 422 F.2d 405, 414, 190 Ct.Cl. 811 (1970), cert. denied, 400 U.S. 819, 91 S.Ct. 35, 27 L.Ed.2d 46.

disposition is sales. Rather, we refuse capital gains treatment in those instances where over time there has been such a thoroughgoing change of purpose, see, e.g., Thompson, supra, as to make untenable a claim either of twin intent or continued primacy of investment purpose. [45]

VI.

Having surveyed the Hardtimes terrain, we find no escape from ordinary income. The frequency and substantiality of sales over an extended time, the significant improvement of

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45. Winthrop, supra, although different from Biedenharn in respect to initial intent, is not contrary to our Malat analysis. In Winthrop, taxpayer inherited property, a method of acquisition which is necessarily neutral as to original purpose. We found that after receipt of his legacy, the Winthrop taxpayer, at all times held the lots "primarily for sale." Winthrop, supra at 911. Although encountering original investment purpose instead of neutral intent in the present case, we conclude that Biedenharn dissipated that initial purpose by its later sales activities. This alteration resulted in Biedenharn like Winthrop, holding retail lots over an extended period "primarily for sale to customers in the ordinary course of [his] trade or business." Thus, in both cases, taxpayers moved to and maintained a primary sales purpose over an extended period. In neither instance did they hold for dual purposes.

the basic subdivisions, the acquisition of additional properties, the use of brokers, and other less important factors persuasively combine to doom taxpayer's cause. Applying Winthrop's criteria, this case clearly falls within the ordinary income category delineated in that decision. [46] In so concluding, we note that Winthrop does not represent the most extreme application of the overriding principle that "the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly." Corn Products Refining Co. v. Commissioner of Internal Revenue, 1955, 350 U.S. 46, 52, 76 S. Ct.

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46. The greater percentage of realty sales income, the construction of five houses, the holding of a real estate license, the originally neutral acquisition purpose, and the slightly higher pitch of sales in the years immediately preceding suit all characteristic of Winthrop do not make that case significantly different from Biedenharn any more than the longer history of sales, additional acquisition of land, use of a business office, existence of a telephone listing, original investment purpose, or employment of brokers who advertised and actively solicited customers characteristic of Biedenharn materially distinguish the present suit from Winthrop. The cases are at bottom similar. One need not go beyond Winthrop in order to decide the present dispute.

20, 24, 100 L.Ed. 29,35. See also Commissioner of Internal Revenue v. Lake, 1958, 356 U.S. 260, 265, 78 S.Ct. 691, 694, 2 L.Ed.2d 743,748. Accord, Winthrop, supra at 911.

We cannot write black letter law for all realty subdividers and for all times, but we do caution in words of red that once an investment does not mean always an investment. A simon-pure investor forty years ago could by his subsequent activities become a seller in the ordinary course four decades later. The period of Biedenharn's passivity is in the distant past; and the taxpayer has since undertaken the role of real estate protagonist. The Hardtimes Plantation in its day may have been one thing, but as the plantation was developed and sold, Hardtimes became by the very fact of change and activity a different holding than it had been at its inception. No longer could resort to initial purpose preserve taxpayer's once upon a time opportunity for favored treatment. The opinion of the District Court is reversed.

APPENDIX I
(Plaintiff's Answers to Interrogatory 26)

YEAR	GROSS SALES	NUMBER LOTS
1923	1,900.00	4
1924	1,050.00	2
1925	7,442.38	18
1926	11,184.00	29

YEAR	GROSS SALES	NUMBER LOTS
1927	9,619.25	52
1928	49,390.55	37
1929	35,810.25	55
1930	8,473.00	24
1931	5,930.00	18
1932	none	none
1933	520.00	2
1934	5,970.00	8
1935	2,639.00	7
1936	2,264.00	3
1937	14,071.00	8
1938	1,009.00	3
1939	5,558.00	10
1940	3,252.00	4
1941	2,490.00	3
1942	6,714.00	9
1943	6,250.00	12
1944	9,250.00	38
1945	15,495.00	20
1946	12,732.58	29
1947	38,310.00	169
1948	23,850.00	22
1949	8,830.00	26
1950	9,370.00	19
1951	55,222.99	16
1952	38,134.29	16
1953	123,007.22	17
1954	235,396.04	10
1955	76,805.00	20
1956	100,593.25	61
1957	133,448.10	36
1958	110,369.00	27
1959	44,400.00	12
1960	130,610.19	21

YEAR	GROSS SALES	NUMBER LOTS
1961	48,729.60	25
1962	6,720.00	1
1963	7,475.00	1
1964	77,650.00	10
1965	75,759.00	10
1966	155,950.00	20
1967	75,380.00	9
1968	89,447.50	10
1969	31,010.00	3
1970	none	none
1971	130,000.00	139

RONEY, Circuit Judge (specially concurring):

I concur with the result and the analysis in Judge Goldberg's opinion with this comment: as I understand the holding in United States v. Winthrop, 417 F.2d 905 (5th Cir. 1969), and Judge Goldberg's opinion here, the Court does not deviate from strict application of the statute to determine whether property is excluded from capital asset—capital gains treatment because it is "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." 26 U.S.C.A. § 1221(1). As I understand the various factors set forth in Winthrop and discussed in Judge Goldberg's opinion here, the statutory test is still paramount and the factors serve only to aid in the determination of whether the statutory characteristics of non-capital assets are present. Under

§ 1221(1) it must first be determined that the property is held "primarily for sale;" and if so, that the sales are made in the ordinary course of taxpayer's trade or business. This statutory standard is strictly followed in both Winthrop and in this case. The various indicia which courts have delineated are useful in applying the § 1221(1) test to the facts of a case, but should not be regarded as a substitute for the statutory test.

GEE, Circuit Judge, with whom BELL, COLEMAN, AINSWORTH and DYER, Circuit Judges, join, dissenting.

Viewing as incorrect the en banc majority's restatement of facts and law, I must respectfully dissent. I would adhere to the panel opinion, reported at 509 F.2d 171, which attempted to apply existing, controlling precedent in our circuit to the facts of this very close case as they were found by the district court. To obtain a different result, the majority has found it necessary to revise the law and refind the facts in important respects, as though the obtaining of capital gains treatment by this taxpayer in the three years in question were a catastrophe to be avoided at all costs. [1]

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1. The majority opinion correctly notes, supra at 493, n. 17, that the panel opinion errs insofar as it suggests that all sales were by commission brokers during the tax years in

First, in setting out the facts of this case, the majority summarily discounts a critical trial court factfinding without ruling it clearly erroneous. [2] The majority rejects the district court's finding that taxpayer "is still farming a large part of the land," 356 F. Supp. at 1336, [3] refinding the facts as being that taxpayer's tenant farmer "may" presently be farming the land, supra at 411, and that neither plaintiff nor the lower court claimed any dual purpose, id. at 423, n. 43. But the record affirmatively shows that the land has been and

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issue. A very substantial majority were, however; and this circumstance, though not devoid of significance, is not central to the reasoning of either the panel opinion or the majority opinion here, use of brokers being consistent with either a liquidation or a business.

2. While I agree with my brethren, supra at 416, N. 25, that this court must review ultimate legal determinations de novo, we must remember that fact determinations, which admittedly affect our legal conclusions, should be overturned only after careful scrutiny under the strict "clearly erroneous" standard.

3. See also id. at 1335 ("substantial parts of [taxpayer's property] are still farmed").

continues to be farmed, [4] and the lower court specifically found multi-purpose use of the land. [5]

Second, although insisting at one point that it only "resummarizes" the relevant case law, id. at 415, n. 23, the majority revises the old test by placing pre-eminent emphasis on sales activity and improvements, effectively eliminating the other factors enunciated in United States v. Winthrop, 417 F.2d 905 (5th Cir. 1969). [6] It is true that, to justify its emphasis

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4. See Transcript at 8, 50; Deposition of B. W. Biedenharn at 37 - 38. In fact, many potential customers were rejected when they requested land that taxpayer intended to farm. Id. at 22.

5. The district court found the following:

> Sales of lots were not the sole object of taxpayer's business, nor did they approximate even a substantial part of taxpayer's activities. There was no singleness of purpose here . . . . Here the property has been used for other purposes and still is being used for such.

356 F. Supp. at 1336 (emphasis added).

6. Indeed, at another point the majority appears to say that Winthrop will no longer be followed at all, except in cases of "forced change of purpose." Supra at 422. If so, we are not told what the new test is to be, unless it is—as the opinion comes perilously close

on sales, the majority claims to detect in our earlier cases an overriding tendency toward finding ordinary income as the frequency and substantiality of sales increase. But that the strength of one factor, if it is a factor, can affect the outcome is self-evident, and as the panel opinion recognized in discussing a different one: "[I]f this factor is to be included in the seven other than as a sham there must be instances imaginable in which it will be critical, perhaps dispositive." 509 F.2d at 175. To bolster its reasoning, the majority points to Thompson v. Commissioner of Internal Revenue, 322 F.2d 122 (5th Cir. 1963), which held against the taxpayer, and asserts that the other sales indicia favored the taxpayer more in that case than here. Not so: in Thompson the taxpayer earned 48.8% of his income from the real estate sales in question, as compared to 11.1% here. More significantly, once Thompson's sales began,

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to saying—that unless there is forced change of purpose there can be no capital gain. But the quoted language may mean no more than that the majority proposes to emphasize one Winthrop factor in one sort of case and not in another. If so, one can only pity the poor taxpayer, confronted now not only by Winthrop but by the court's announcement that dispositive nuances of weight attach to some factors in some cases. If this were the law before today, there had been few hints of it; and with this announcement we all but lay down as law that ordinary income is whatever we say it is.

"there is no evidence that he thereafter held the lots for any purpose other than the sale to prospective purchasers." Id. at 128 (emphasis in original). Here, however, taxpayer still farms the land.

To explain its emphasis on improvements, the majority stresses the similarity between taxpayer's improvements and those present in Winthrop. Supra at 417. But this comparison, too, is mistaken. The Winthrop court emphasized that property does not cease to be a capital asset merely because its increase in value was due in part to the taxpayer's efforts in making improvements. 417 F.2d at 907-09, quoting the same portion of Barrios' Estate v. Commissioner of Internal Revenue, 265 F.2d 517 (5th Cir. 1959), that the panel in this case cited:

> The idea of selling a large tract of land in lots embraces necessarily the construction of streets for access to them, the provision of drainage and the furnishing of access to such a necessity as water. It is hardly conceivable that taxpayer could have sold a lot without doing these things.

Id. at 520, quoted with approval in Winthrop, 417 F.2d at 909, and Biedenharn, 509 F.2d at 174 (panel opinion). Furthermore, the Winthrop situation was shot through with facts not here present supporting the conclusion that the land was "property held by the taxpayer primarily

for sale to customers in the ordinary course of his trade or business": (1) taxpayer used the land for nothing but subdividing and selling, and "[t]here were, therefore, no multiple, dual, or changes of purpose during the relevant years . . . . The taxpayer, long before the tax years in question, had as his sole motivation the sale of [the property]," 417 F.2d at 911 (emphasis added)—i.e., the property was held "primarily for sale"; (2) as in Thompson, the taxpayer's primary activity was substantial and continuous real estate sales, from which she earned 52.4% of her income—i.e., this activity was a "business"[7]; and (3) the taxpayer began selling shortly after he acquired the land, never using it for any other purpose[8] —i.e., the sales were "ordinary

7. The majority attempts to discount the significance of the low portion of taxpayer's income represented by real estate sales (11.0%) by pointing out that the profit figure is high in absolute terms and low as a percentage only because taxpayer earns high profits in other businesses. Supra at 419. I fail to discern the significance of either explanation, especially in light of the importance placed on a high relative percentage in both Thompson and Winthrop, unless the opinion means to say that taxpayers with high incomes are less likely to have capital gains than those with low incomes.

8. As the Winthrop court recognized, 417 F.2d at 912, this singleness of purpose, rather than any such "forced change of purpose" as

in the course of this business."

Thus, to the extent that I agree with the majority that "[o]ne need not go beyond Winthrop in order to decide the present dispute," supra at 423, n. 46, I think Winthrop, in the form in which it stood at the time this taxpayer was presumably arranging its affairs in reliance on that opinion requires a different result in this case—that reached by the panel, 509 F.2d 171 (1975).

In the course of "resummarizing" the relevant test, the majority adds a wholly new element, volition or the lack of it, in cases such as this involving an initial investment purpose followed by substantial and continuous sales activity. But to permit a finding of continuing investment purpose in the face of major sales activity only (or as the majority says, supra at 421, "most generally") when that activity "results from unanticipated, externally induced factors which make impossible the continued pre-existing use of the realty," id. at 421, makes impossible any voluntary disposition of investment property at capital gains rates, exalts one factor—sales activity—over all others, and changes the law as declared in Thompson and Winthrop, if not their results. This circuit's long-standing inclusion of factors other than sales activity in the capital

is introduced by the majority here, supra at 418, distinguishes Winthrop from Barrios' Estate.

gains/ordinary income calculus implicity recognized that an investor could engage in a voluntary liquidation and begin selling property without a change of purpose. Holding that property is not part of a business only so long as it is sold in large blocks, but not if it is sold in small parcels, discriminates irrationally against an investor who decides on liquidation but cannot locate purchasers interested in large acquisitions. [9]

And so, under the guise of emphasizing certain factors, the majority appears to have completely changed the Winthrop test to eliminate all factors but one. And while I entirely agree with the majority's redundant warning that "once an investment does not mean always an investment," id. at 423, I would also suggest that once a sale does not mean always a business.

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9. As the majority admits, supra at 412, n. 10, the record does not clearly indicate the number of sales, as opposed to the number of lots sold, and in some years we know that single sales accounted for the large numbers of lots disposed of in those years, see id. at 412, nn. 11 & 12.

APPENDIX II

BIEDENHARN REALTY COMPANY, INC.
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant

No. 73-3690

United States Court of Appeals,
Fifth Circuit.

March 10, 1975.

Rehearing En Banc Granted May 12, 1975.

Appeal from the United States District Court for the Western District of Louisiana.

Before GEWIN, AINSWORTH and GEE, Circuit Judges.

GEE, Circuit Judge:

Once more we are called on to characterize profit from sales of subdivision lots as ordinary income or capital gain. The facts, pre-eminent in these cases, [1] are detailed in the careful opinion below [2] and we set out only

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1. United States v. Winthrop, 417 F.2d 905 (5th Cir. 1969).

2. Biedenharn Realty Co. v. United States, 356 F.Supp. 1331 (W.D. La. 1973).

a précis of them.

Taxpayer is a family investment corporation organized by the paterfamilias in 1923 for advantages of scale and unity. Among its holdings are bottling plants, a shopping center, miscellaneous commercial and residential rent properties, several going businesses, a portfolio of stocks and bonds, two farms and Hardtimes Plantation. This last, the terrain of our case, is a 973-acre farm purchased at a bargain[3] in 1935. Taxpayer has since farmed it continuously but has also, as the nearby city of Monroe expanded toward and over Hardtimes during the years from 1939 through the taxable years in question (1964-66), subdivided and disposed of about half its acreage in residential lots. Since the United States does not dispute that taxpayer's original purpose in buying Hardtimes was investment, but rather contends that a change in that purpose is evidenced by taxpayer's mode of operation and handling of the property, we describe these briefly.

Taxpayer has four employees: A farmer and a camp caretaker are fulltime, but its manager and its bookkeeper are, respectively, principally employed as general manager and comptroller of a soft drink corporation, another family enterprise. The manager testified that

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3. For $50,000, or just over fifty dollars per acre. Record evidence indicated a raw land value of one of the subdivisions when sold at seven to eight thousand dollars per acre.

taxpayer's affairs occupied about ten percent of his time, chiefly spent in supervising rental collections and building maintenance. Taxpayer has a listed telephone, which rings in the soft-drink concern's offices, but no offices of its own. Though, because of special circumstances,[4] the taxpayer has platted and sold one other tract in lots and platted, though it did not so sell, two others back in the 1920's, it is fair to say it does not have a significant history of acquiring and subdividing other tracts of land. Indeed, the United States does not seriously contend that it is in that business unless its Hardtimes activities put it there.

The subdivision and sale of Hardtimes has proceeded somewhat languidly. From the time of the first lot sale in 1939 through 1966, the last taxable year in question, sales averaged about five per year. Some sales were of multiple lots. 1957 was the high year, with 23 transactions involving 35 1/2 lots. In six of these years, no lots were sold and in eight-including 1962 and 1963 - only one. During the three taxable years in question sales were 37, or about one per month on the average.

In all instances taxpayer laid out and paved streets by the lots sold, and sometimes it added curbs and gutters, sewerage and utilities. Selling

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4. Taxpayer purchased a site for a glass plant, but negotiations with the glass company failed to persuade it to locate in Monroe. Taxpayer therefore platted and sold the site.

was by independent commission agents, who handled all aspects of the transaction except fixing of price and transfer of title, done by the taxpayer. The agents bore, from their commissions, such merchandising costs as there were: signs posted on the property and newspaper advertisements. Taxpayer's profits ranged from 74% to 97%, reflecting in significant part[5] the initial bargain price and the approach of Monroe. During the years in suit, gains from Hardtimes' lots were about 11% of taxpayer's gross income.

Our case originated as taxpayer's action for refund of something over $30,000 in additional taxes determined by the Internal Revenue Service to be due as a result of its classification of the 1964-66 gain on lot sales as ordinary income. The district court, taking testimony and documentary evidence which established as undisputed the facts summarized above, concluded that the lots in question were not "held primarily for sale" nor were the taxpayer's activities in connection with them a "trade or business." Instead, it found the taxpayer to have been engaged in no more than the reasonable improvement for liquidation and liquidation of portions of a large farm property acquired and held for investment, which had greatly appreciated in value as a result of market factors favorable to but not caused by the taxpayer. The Court's

5. The court below heard expert testimony that subdividers' profits in the area usually did not exceed 33 1/3%.

analysis proceeded along conventional lines, giving due regard to the seven major factors reiterated in Winthrop[6] and recognizing that these furnish only a matrix giving form to the

6. "(1) the nature and purpose of the acquisition of the property and the duration of the ownership; (2) the extent and nature of the taxpayer's efforts to sell the property; (3) the number, extent, continuity and substantiality of the sales; (4) the extent of subdividing, developing, and advertising to increase sales; (5) the use of a business office for the sale of the property; (6) the character and degree of supervision or control exercised by the taxpayer over any representative selling the property; and (7) the time and effort the taxpayer habitually devoted to the sales. Smith v. Dunn, supra [5 Cir.], 224 F.2d [353] at 356.

Despite their frequent use, this court has often declared that these seven pillars of capital gains treatment 'in and of themselves * * have no independent significance, but only form part of a situation which in the individual case must be considered in its entirety to determine whether or not the property involved was held primarily for sale in the ordinary course of business (source cited).' Cole v. Usry, supra [5 Cir.] 294 F.2d [426] at 427. Accord: Thompson v. Commissioner of Internal Revenue, 5 Cir. 1963, 322 F.2d 122; Wood v. Commissioner of Internal Revenue, 5 Cir. 1960, 276 F.2d 586; Thomas v. Commissioner of Internal

consideration of each individual case as a whole. Other appropriate principles are recognized and applied in the published opinion, a reiteration of which would serve little purpose here. On appeal to us, however, the Government attacks along lines somewhat less conventional, which may be fairly summarized as follows:

Capital gain treatment, we are told, must turn on the purpose for which the property is held at the time of sale, not at some earlier time. Biedenharn Realty Company, the taxpayer, was subdividing, improving and developing this land, a procedure generally recognized as a business. Had Biedenharn bought this land for purposes of subdividing just before so using it, it could not have expected capital gain treatment. Hence, its earlier purposes and uses become irrelevant. Moreover, Biedenharn's activities may not properly be considered liquidation, since in a "true" liquidation the property is offered without change of form, for whatever price it will bring. Since Biedenharn sought to create additional value by changing the property's form, it chose not to "liquidate" but to use the property in a new and different manner-and one recognized as a business. Biedenharn's

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Revenue, 5 Cir. 1958, 254 F.2d 233; Smith v. Commissioner of Internal Revenue, 5 Cir. 1956, 232 F.2d 142; Consolidated Naval Stores Co. v. Fahs, 5 Cir. 1955, 227 F.2d 923." United States v. Winthrop, 417 F.2d 905, 910 (5th Cir. 1969).

situation should be tested purely by examining the nature of its activities at time of sale, or as if its original purpose in buying the land was subdivision and sale of residential lots. So seen, Biedenharn's situation is not essentially different from that of Winthrop and Thompson.[7] Finally, at oral argument stress was laid on the incongruousness, even unfairness, of according markedly different tax treatment to two hypothetical parcels of land, lying side by side and developed and sold in the same or similar manners, on the basis, in part, of past purposes and uses, or even present uses of other adjacent portions in common ownership.[8]

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7. Thompson v. Commissioner of Internal Revenue, 322 F.2d 122 (5th Cir. 1963).

8. In counterpoint, the Government also pursues a reliance on Winthrop, supra, and a likening of this case to that, in which the Service prevailed. But there are significant facts distinguishing Winthrop from the matter in hand, some noted in the district court opinion and some not. Winthrop inherited substantial acreage in the Tallahassee environs and pursued an orderly program of subdividing and selling it, platting and laying out streets, installing utilities and in some cases sewer lines. Unlike Biedenharn, however, this was his primary and, indeed, well-nigh his sole activity during the tax years in question. Over half his income resulted from this activity. The tempo of his sales was somewhat higher,

[1] We are not persuaded. The first argument, which asks us in terms to read out of the analysis Winthrop's first factor - "the nature and purpose of the acquisition of the property and the duration of the ownership" - would require us to overrule Winthrop pro tanto, which we decline to do. Implicit in the capital asset concept are such notions as the factor epitomizes; they belong in the calculus. Further, the argument proves too much: if one focuses exclusively on the instant of sale, of course the lot being sold is at that moment "held primarily for sale." And if a recent, constructive purchase for purposes of subdividing

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having reached 64 transactions in one past year and averaging 24 per year over the period of his efforts. On some of the lots he constructed houses for sale. He held a real estate brokers license and, though rather passively, did his own selling. His sole motivation, our opinion notes, long before the tax years mooted, had been the development and sale of his lots, and he devoted to it a substantial amount of his time, skill and financial resources. He began selling lots shortly after he acquired the land and he never used the land for any other purpose. None of these factors, taken alone, is a talisman. Taken together, however, as they must be, they make ours a different case; and by its other arguments the government tacitly but correctly recognizes that it must go beyond Winthrop to prevail here.

is to be imputed in every case of a lot sale, then the concepts of purchase for investment and orderly liquidation, embedded in our case law,[9] are simply purged from it.

[2] The second argument, asserting that any change in form of the asset made by the taxpayer prevents its disposition being a liquidation; flies directly in the face of this Court's holding in Barrios' Estate v. Commissioner of Internal Revenue, 265 F.2d 517, 520 (5th Cir. 1959), cited and quoted with approval in Winthrop:

> The idea of selling a large tract of land in lots embraces necessarily the construction of streets for access to them, the provision of drainage and the furnishing of access to such a necessity as water. It is hardly conceivable that taxpayer could have sold a lot without doing these things.[10] On reason and authority, we reject it.

[3] The final argument, instancing possible differing tax consequences for adjacent tracts developed similarly merely because one was acquired as an investment and long held while the other was not, represents a mild form of the "chamber of horrors" or "most unforseeable

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9. See authorities at note 6 above.

10. United States v. Winthrop, 417 F.2d at 909.

consequences" technique - and likewise proves too much. Such possibilities are inherent in the congressional scheme of providing different tax rates for gain realized on disposition of long-held capital assets than for ordinary income. There is nothing especially shocking in this instance of the general plan; a mere day or two difference in the holding period of a capital asset could have a similar effect. As the Government notes, it is just conceivable that two hypothetical tracts might be side-by-side and be so developed that Winthrop's other six factors are equivocal and so that a difference in purpose of purchase and holding period between them might be dispositive of capital gain treatment for one and ordinary income treatment for the other. If so, we need not blanche; if this factor is to be included in the seven other than as a sham there must be instances imaginable in which it will be critical, perhaps dispositive. On this head, the Government's argument finally comes down to a dispute with the Congressional scheme of taxation and with Winthrop. We are powerless to alter the first were we so inclined, and we decline to alter the second.

Thus matters remain, in our Circuit, essentially where the now-famous [11] passage from an earlier edition of Mertens, commenting

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11. Quoted in Cole v. Usry, 294 F.2d 426, 427 n. 3 (5th Cir. 1961) and Thompson v. Commissioner of Internal Revenue, 322 F.2d 122, 123 n. 2 (5th Cir. 1963).

on "Capital Gains: Dealer v. Investor Problems," left them: "If a client asks in any but an extreme case whether, in your opinion, his sale will result in capital gain, your answer should probably be, 'I don't know, and no one else in town can tell you.'" The difficulty, however, is inherent in the nature of the thing itself, and does not lie in judicial perversity or a delight in being obscure. Results cannot be casually predictable where so many variables are present and so many factors of judgment must be exerted. Extreme cases will be clear, but those who elect to sail close to the wind must take their chances.

[4] Biedenharn has walked a dangerous path in the case at bar. The trial court concludes that it has done so unscathed. And though, as Winthrop notes, where there is no basic disagreement as to the evidentiary facts and the trial court's conclusion of the ultimate facts is the product of legal reasoning, we are not trammeled by the clearly erroneous rule, still the decision of the court which saw and heard the witnesses is always entitled to a certain deference. We conclude, moreover, that the court correctly applied our case law and that its decision is right.

Affirmed.

GEWIN, Circuit Judge (dissenting):

With deference to the views expressed in the majority opinion, I respectfully dissent. The

relevant facts are sufficiently outlined by Judge Gee. It is my view that the facts, when considered in their totality, United States v. Winthrop, 417 F.2d 905 (5th Cir. 1969), compel the conclusion that the lots in question were "held primarily for sale" and that the taxpayer's activities in connection with the lots was a "trade or business." Accordingly, the profits from the land sales should be regarded as ordinary income, rather than capital gain.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING
EN BANC

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc.

It is ordered that the cause shall be reheard by the Court en banc on briefs without oral argument. The Clerk shall set a briefing schedule for the filing of supplemental briefs.

APPENDIX III

BIEDENHARN REALTY COMPANY, INC.

v.

UNITED STATES OF AMERICA.

Civ. A. Nos. 16798-16800.

United States District Court,
W. D. Louisiana,
Monroe Division.

March 20, 1973.

DAWKINS, Chief Judge.

OPINION

This controversy brings before us the "old, familiar, recurring, vexing and ofttimes elusive" problem of whether to treat profit arising out of sales of subdivided real estate as capital gains or ordinary income.

In United States v. Winthrop, 417 F.2d 905 (5th Cir., 1969), the Fifth Circuit chose the ad hoc approach in reaching a solution to that controversy. Here, we take the same approach.

Of course, the applicable statutory provision is 26 U.S.C. § 1221:

Capital Asset Defined

"For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade of business), but does not include--

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business; . . . "

Bidenharn Realty Company, Inc. (taxpayer) is a corporation which was organized by Joseph Biedenharn in 1923, the original stockholders consisting of members of his family. This corporation was formed as an investment company according to B. D. Biedenharn, this being uncontradicted by the Government, in order that members of the family might aggregate their investments rather than each investing individually. In its charter the stated business is farming, investments, and rental property, its primary business being investments.

Those investments include two Coca-Cola manufacturing and bottling plants, warehouses, a shopping center, residential houses for rent, store buildings and farm property, consisting of two farms outside the City of Monroe and Hardtimes Plantation, at one time also beyond the City limits, but now included therein, portions of which are the bones of contention in this suit. The company also has a portfolio of stocks and bonds. Additionally, it owns a motel and other businesses.

Hardtimes Plantation was acquired in 1935, the stated purpose for the acquisition being farming and future investment. The corporation paid $50,000 for approximately 1,000 acres of land, the purchase being consummated during the middle of the Great Depression. Following acquisition of Hardtimes, the corporation farmed this land. At first, it employed a farm manager, and later entered into a contract with one McHenry, who was and still is an expert farmer. He farmed the plantation for many years and is still farming part of it. The first parcel sold out of the plantation was in 1939, to Claude Harrison. The subdivision plat of Hardtimes Plantation was drawn by the Zigfried Company in 1937. The plat never was used except for the Claude Harrison sale.

In 1939, the corporation set aside a portion of Hartimes as Biedenharn Estate Unit No. 1. During a period of 17 years, or until 1956, this subdivision of twenty lots was sold in five sales. Bayou DeSiard Country Club Estates Addition to

Monroe was created out of the plantation in 1951. Subsequently, it was resubdivided so as to contain 70 lots, 68 1/2 of which were sold between 1951 and 1966, in 64 separate sales. Oak Park Subdivision was created out of the plantation in 1954. It contains 164 lots, of which 104 were sold between 1954 and 1966. This includes both Unit No. 1 and Unit No. 2. Biedenharn Estates Unit No. 2 was established in 1960. Ten of the 15 lots therein were sold between 1960 and 1965. This was accomplished by 10 sales.*

These occurred as the City of Monroe expanded northward toward Hardtimes Plantation, and during this development the taxpayer sold lots for homesites. The Oak Park Addition, the Bayou DeSiard Country Club Addition, and Biedenharn Estates Unit No. 2 were improved and developed before lots were sold. These improvements included sewerage, engineering, streets, and water. The company expended a total of $56,879.12 on its Bayou DeSiard Country Club Addition; a total of $141,579.25 on its Oak Park Addition, and a total of $9,519.17 on its Biedenharn Estates Unit No. 2 subdivision.

In 1925, the taxpayer acquired property denominated as Owens' Factory Site, which was to provide a location for an Owens-Illinois Glass Plant. This would have been a convenient source of obtaining bottles for the Biedenharn's Monroe Coca-Cola plant. Later, this site was subdivided and dedicated as Biedenharn's Addition because

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*See Plaintiff's Exhibit #2, photocopy attached.

plans for construction of the glass plant never materialized. Improvements were made and lots were sold by taxpayer from its Owens Factory Site. This, of course, did not occur during the years in question in this action, but is relevant to some extent in showing continuity of sales of land plots by taxpayer.

Its officers testified that the taxpayer itself did not advertise the property for sale, but that individuals seeking such desirable property would contact them and inquire whether or not it was for sale. The company sold several lots in this manner. It took no more than fifteen minutes to completely handle a sale, which normally was consummated by telephone with documentary transfers being handled by the company's legal counsel. Henry Biedenharn, Jr., testified that he spent about 10% of his time on the affairs of Biedenharn Realty Company. His primary duties involved collecting rents and maintaining rental property. The tax returns show that the gains from the sale of Hardtimes lots contributed only 11.1% to the company's gross income during the years involved in this suit.

Taxpayer has turned over subdivisions to independent contractors to sell three times. Oak Park Subdivision Unit No. 2 was handled by Faulk & Foster, and Oak Park Subdivision No. 1 was handled by Mr. Herbert Rosenhein. The Trentman Company of Fort Worth was engaged to dispose of the Owens tract many years prior to the taxable period in question here. The only control exercised over Rosenhein (representing taxpayer

as a realtor) was that the taxpayer determined the selling price and, of course, executed the deed after all the papers and documents had been prepared. This was essentially the same arrangement taxpayer had with Faulk. Both brokers sold on a commission basis.

Taxpayer's income during the years in question was derived from stocks, bonds, farming operations, rentals, royalties, and the sale of subdivided lots. Taxpayer filed timely federal income tax returns disclosing these sales, and on these three income tax returns, it included its profit on real estate sales as 60% ordinary income and 40% capital gains. Subsequently, additional income taxes and interest were assessed against and collected under protest from the taxpayer by the Internal Revenue Service on the ground that profits earned by taxpayer from sales of subdivided lots, which were developed and improved by taxpayer, should be treated solely as ordinary income. Taxpayer filed claims for refunds, claiming that the sales profit should be treated as capital gains and not ordinary income. These claims were disallowed, and this action ensued.

The Government's position basically rests on two grounds. 1) The Government contends that subdividing the property and spending monies in developing and improving the property indicate that the lots sold were held for sale to customers primarily in the ordinary course of business; and, 2) additionally contends that the most important factor to be considered is the number, continuity, and frequency of sales by taxpayer. The Government concludes that this is not a case of mere

occasional sales made in liquidation of a large landholding but instead is a case showing a continuous, annual, regular, and recurring pattern of selling and developing inventories of lots. Of course, the Government buttresses its position with other factors which it believes indicate that taxpayer held these lots primarily for sale to customers in the ordinary course of business: the taxpayer employed an individual or firm to sell the lots; the lots were advertised for sale, whether by taxpayer or its broker; there were restrictions in the deeds and plats limiting construction to single-family residences of at least 60% masonry construction, with a minimum area of at least 1200 square feet, and taxpayer dedicated portions of the three subdivided and improved properties as streets for public use.

[1] The fact that these properties were subdivided and improved does not, in and of itself, require the conclusion that this land was held primarily for sale to customers in the ordinary course of business. In Barrios' Estate v. Commissioner of Internal Revenue, 265 F.2d 517 (5th Cir., 1959), the Fifth Circuit stated the following:

> "The idea of selling a large tract of land in lots embraces necessarily the construction of streets for access to them, the provision of drainage and the furnishing of access to such a necessity as water. It is hardly conceivable that taxpayer could have sold a lot without doing these things. To contend that reasonable expenditures and efforts, in such necessary undertakings are not entitled to capital gains

treatment is to reject entirely the established principle that a person holding lands under such circumstances may subdivide it for advantageous sale." At p. 520.

This decision was cited approvingly in United States v. Winthrop, supra.

[2] The facts to be considered in determining whether profits derived from the sale of land are capital gains or ordinary income are: "(1) The nature and purpose of the acquisition of the property and the duration of the ownership; (2) the extent and nature of the taxpayer's efforts to sell the property; (3) the number, extent, continuity and substantiality of the sales; (4) the extent of subdividing, developing and advertising to increase sales; (5) the use of a business office for the sale of the property; (6) the character and degree of supervision or control exercised by the taxpayer over any representative selling the property; and (7) the time and effort [that] the taxpayer habitually devoted to the sales." United States v. Winthrop, supra, 417 F.2d at page 910, citing Smith v. Dunn, 224 F.2d 353 (5th Cir., 1955). See also, Hansche v. C.I.R. 457 F.2d 429 (9th Cir., 1972); Huxford v. United States, 441 F.2d 1371 (5th Cir., 1971); Myers v. United States, 345 F. Supp. 197 (N.D. Miss., 1972).

However, these tests "in and of themselves . . . have no independent significance, but only form part of a situation which in the individual case must be considered in its entirety to determine whether or not the property involved was

held primarily for sale in the ordinary course of business." Cole v. Usry, 294 F.2d 426, 427 (5th Cir., 1961), citing 3B Mertens' Law of Federal Income Taxation § 22.138, at p. 623.

Here there is no actual disagreement concerning the facts. The Government adduced no evidence in its behalf and contented itself with cross-examination of those witnesses presented by plaintiff. The only disagreement between the parties is whether the finding of ultimate fact should be that the land was primarily for sale in the ordinary course of taxpayer's business.

We are compelled to construe narrowly the definition of a capital asset, and as a corollary interpret its definition of exclusions broadly. United States v. Winthrop, supra. The first issue we consider is whether taxpayer held the property "primarily for sale," as that phrase is used in § 1221. The Supreme Court in Malat v. Ridell, 383 U.S. 569, 86 S. Ct. 1030, 16 L.Ed.2d 102 (1966), held that "primarily" means "of first importance" or "principally" as used in § 1221(1).

We find, without doubt, that taxpayer acquired Hardtimes Plantation as an investment in 1935. The Government has not contended seriously otherwise. It is uncontradicted that this property was farmed, leased for farming, and substantial parts of it are still farmed. Within the first fifteen years after acquisition of the property, there had been only six separate sales of portions of it. These facts, together with the uncontradicted

stated purpose for which it was acquired, establish that this property was acquired as an investment by taxpayer. As noted, parts of the plantation are still farmed, and thus the duration of ownership has been over an extended period of nearly forty years, although parts of it have been sold. Therefore, we conclude the evidence to be clear and uncontradicted that taxpayer acquired this property as an investment.

[3] However, what once was an investment or what may start out as a liquidation of an investment may become something else. Ackerman v. United States, 335 F.2d 521 (5th Cir., 1964); Thompson v. C.I.R., 322 F.2d 122 (5th Cir., 1963). In the taxable years in question, taxpayer sold 38 Lots through 37 sales, either on its own or through brokers. In a three-year period, this amounts to approximately 1 sale a month; although this is not a large volume of sales, one still may be considered holding property primarily for sale in the ordinary course of business if the continuity of the sales over a long time is such that it will indicate that the seller is a dealer in real estate. The converse is also true. The Fifth Circuit delcared in Ross v. Commissioner, 227 F.2d 265 (5th Cir., 1955):

> "The argument of the Commissioner with respect to the volume and frequency of sales here is also answered by the Goldberg case [223 F.2d 713]. The Commissioner here leaned heavily upon the fact that more than 80% of the houses owned by the taxpayer were sold in one year and at a profit of more than

> $58,000. The answer we gave there was that the corporation had a lot of houses to sell: 'The sales were frequent and continuous; but since the circumstances were favorable to selling to individuals and the project was a large one, this is entirely consistent with liquidation of it as an investment. . . . There was absolutely no evidence of any promotional activity or that petitioners used the proceeds to buy and sell other houses. . . .'" At p. 268.

Consequently, the conclusion we feel compelled to reach from the evidence presented is that 1) taxpayer had made a large acquisition of land, which was farmed; 2) the City of Monroe expanded northward; 3) the demand for property became greater; and 4) these factors caused the land to appreciate in value and taxpayer decided to liquidate part of its holdings. It made these holdings more attractive by development and improvement. Thus the evidence is clear that the lots were not held by Biedenharn principally or primarily for sale as that phrase was interpreted by the Supreme Court in Malat, supra.

Even if we considered the lots to be held primarily for sale to customers in the ordinary course of business taxpayer must meet one more test to be denied capital gains treatment because "holding primarily for sale . . . is by itself insufficient to disqualify the taxpayer from capital gains privileges. The sales must also be made in the ordinary course of taxpayer's trade or business. The next issue, therefore, is whether the

taxpayer's activities constituted a trade or business."

Although subdividing and developing were more than normal, no advertising was done by taxpayer. Testimony is to the effect that those persons wanting lots inquired of taxpayer as to its willingness to sell them. It, therefore, solicited no sales. The brokers employed by taxpayer (one during the taxable years in question, and the other approximately ten years previously) advertised in the newspapers generally and by placing signs on the property indicating that lots were for sale.

Taxpayer exerted almost no control whatever over the representative selling the property in question. The only control or supervision exercised was that of establishing the price of the property being sold and the signing of the deed. The representative worked on a commission, and he testified that the taxpayer did not in any way control his selling activities.

Biedenharn Realty has no separate office from that of the President's office in the Coca-Cola Bottling Plant. The only use of this office for selling activities was that of utilizing the telephone to negotiate, and the deeds possibly were signed in this office.

[4] The officers of the company have testified that they spent a minimal amount of their time selling the property and almost no effort. Sales of this property constituted approximately 10% of taxpayer's gross income during the years in

question. Although one may be a dealer in real estate where no office is used, no brokers are employed, no time has been spent promoting sales, and no advertising has been used, one still must be in the business of selling lots to lose his right to capital gains treatment of profits from sales of lots. Winthrop, supra. Here sales were not ordinary in the course of taxpayer's business. Taxpayer did not begin selling shortly after it acquired the land; instead it farmed the land for years, and is still farming a large part of the land; and even though lots have been sold over a number of years, the circumstances indicate that such was not "in the ordinary course" of taxpayer's business. Sales of lots were not the sole object of taxpayer's business, nor did they approximate even a substantial part of taxpayer's activites. There was no singleness of purpose here, thus this case is outside the category of Winthrop, supra. Rather, this factual situation tends to gravitate heavily toward the rules established in Barrios' Estate, supra; Ross, supra; Consolidated Naval Stores Co. v. Fahs, 227 F.2d 923 (5th Cir., 1955); Goldberg v. Commissioner of Internal Revenue, 223 F.2d 709 (5th Cir., 1955). Here the property has been used for other purposes and still is being used for such. Taxpayer is merely liquidating over a long period of time a substantial investment in the most advantageous method possible.

Consequently, we must and do find as an ultimate fact, and conclude that, the property held by taxpayer was not held primarily for sale to customers in the ordinary course of its trade or

business. Therefore, judgment will be granted in favor of plaintiff, allowing its claimed refund with interest.

Counsel will prepare an appropriate order pursuant to our Local Rule 9.

PLAINTIFF'S EXHIBIT # 2

SALES OF LOTS FROM HARDTIMES PLANTATION SUBDIVISIONS

	Oak Park Subd. Unit No. 1	Bledenhorn Est. Unit No. 1	Bayou DeSiard Ctry. Club Est. Add'n to Monroe	Bledenhorn Estates Unit No. 2	Oak Park Subd. Unit No. 2	TOTAL NO. OF LOTS SOLD	TOTAL NO. OF SALES[**]
1935	0	0	0	0	0	0	0
1936	0	0	0	0	0	0	0
1937	0	0	0	0	0	0	0
1938	0	4 (1 sale)	0	0	0	4	1
1939	0	1	0	0	0	1	1
1940	0	2 (1 sale)	0	0	0	2	1
1941	0	3 (1 sale)	0	0	0	3	1
1942	0	0	0	0	0	0	0
1943	0	0	0	0	0	0	0
1944	0	0	0	0	0	0	0
1945	0	0	0	0	0	0	0
1946	0	0	0	0	0	0	0
1947	0	1	0	0	1	1	1
1948	0	7 (1 sale)	0	0	7	7	1
1949	0	0	0	0	0	0	0
1950	0	0	0	0	10	10	8
1951	0	0	0	0	7	7	7
1952	0	0	7	0	6	13	13
1953	0	0	13	0	0	13	3
1954	0	0	5 (3 sales)	0	0	5	3
1955	0	0	9-1/2 (4 sales)	0	0	12-1/2	6
1956	0	2 (1 sale)	5	0	0	19-1/2	14
1957	0	0	5	0	0	35-1/2	23
1958	0	0	1	0	0	22-1/4	17
1959	0	0	6	0	0	12	11
1960	0	0	0	0	0	11	11
1961	0	0	0	0	0	2	2
1962	0	0	0	1	0	1	1
1963	0	0	0	0	1	1	1
1964	3 (2 sales)	0	0	0	0	3	2
1965	12-1/2 (8 sales)	0	0	0	0	12-1/2	8
1966	30-1/2 (10 sales)	0	0	0	0	30-1/2	10
1967	17-1/4(12 sales)	0	0	0	0	17-1/4	12
1968	11 (7 sales)	0	0	0	0	11	7
1969	0	0	0	0	0	0	0
1970	0	0	0	0	0	0	0
1971	0	0	0	0	0	0	0
1972	0	0	0	0	0	0	0
1973	0	0	0	0	0	0	0
1974	0	0	0	0	0	0	0
1975	0	0	0	0	0	0	0
1976	0	0	0	0	0	0	0
1977	0	0	0	0	0	0	0
1978	0	0	0	0	0	0	0
1979	0	0	0	0	0	0	0
1980	0	0	0	0	0	0	0
1981	0	0	0	0	0	0	0
1982	0	0	0	0	0	0	0
1983	0	0	0	0	0	0	0
1984	0	0	0	0	0	0	0
1985	0	0	0	0	0	0	0
1986	0	0	0	0	0	0	0
1987	0	0	0	0	0	0	0
1988	0	0	0	0	0	0	0
1989	0	0	0	0	0	0	0
1990	0	0	0	0	0	0	0
1991	0	0	0	0	0	0	0
1992	0	0	0	0	0	0	0
1993	0	0	0	0	0	0	0
1994	0	0	0	0	0	0	0
1995	0	0	0	0	0	0	0
1996	0	0	0	0	0	0	0
1997	0	0	0	0	0	0	0
1998	0	0	0	0	0	0	0
1999	0	0	0	0	0	0	0
2000	0	0	0	0	0	0	0
2001	0	0	0	0	0	0	0
2002	0	0	0	0	0	0	0
2003	0	0	0	0	0	0	0
2004	0	0	0	0	0	0	0
2005	0	0	0	0	0	0	0
2006	0	0	0	0	0	0	0
2007	0	0	0	0	0	0	0
2008	0	0	0	0	0	0	0
2009	0	0	0	0	0	0	0
2010	0	0	0	0	0	0	0
2011	0	0	0	0	0	0	0
2012	0	0	0	0	0	0	0
2013	0	0	0	0	0	0	0
2014	0	0	0	0	0	0	0
2015	0	0	0	0	0	0	0
2016	0	0	0	0	0	0	0
2017	0	0	0	0	0	0	0
2018	0	0	0	0	0	0	0
2019	0	0	0	0	0	0	0
2020	0	0	0	0	0	0	0
2021	0	0	0	0	0	0	0
2022	0	0	0	0	0	0	0
2023	0	0	0	0	0	0	0
2024	0	0	0	0	0	0	0
2025	0	0	0	0	0	0	0
2026	0	0	0	0	0	0	0
2027	0	0	0	0	0	0	0
2028	0	0	0	0	0	0	0
2029	0	0	0	0	0	0	0
2030	0	0	0	0	0	0	0
2031	0	0	0	0	0	0	0
2032	0	0	0	0	0	0	0
2033	0	0	0	0	0	0	0
2034	0	0	0	0	0	0	0
2035	0	0	0	0	0	0	0
2036	0	0	0	0	0	0	0
2037	0	0	0	0	0	0	0
2038	0	0	0	0	0	0	0
2039	0	0	0	0	0	0	0
2040	0	0	0	0	0	0	0
2041	0	0	0	0	0	0	0
2042	0	0	0	0	0	0	0
2043	0	0	0	0	0	0	0
2044	0	0	0	0	0	0	0	0

Bayou DeSiard Ctry.
Club Add'n Resub.
of Lots 43 thru 49

1964	0	2	0				
1965	0	2	0	1	7		
1966	0	3	0	1	5	10	10
				0	17 (16 sales)	0	0
						20	10

[** This column supplied by the Court.]